IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 63158-6-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
LARRY DONNELL BAKER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 3, 2010
	)	

Ellington, J. — In order to establish prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. Larry Baker challenges certain comments made in closing argument. When viewed in context, the comments were either not improper or were insufficiently prejudicial to affect the jury's verdict. We also reject Baker's claim that his counsel was ineffective when he followed Baker's direction and withdrew his proposed lesser degree instructions. We therefore affirm Baker's conviction for first degree rape with a deadly weapon. But because the trial court imposed invalid community custody conditions, we accept the State's concession of error and remand for resentencing.

FACTS

On Saturday, August 18, 2007, 17-year-old B.C. spent the night at a friend's apartment near Mariner High School in Everett. At about 7:30 a.m. the following

morning, B.C. left the apartment to walk to the nearby McDonald's restaurant to begin her 8:00 a.m. shift. As B.C. walked past the 4th Avenue Village Apartments, a man later identified as Larry Baker came out of the complex, grabbed B.C.'s arm, and placed a box cutter against her throat. Baker told B.C. he would slit her throat if she made any noise and forced her into a nearby carport. Baker then ordered B.C. to remove her clothes.

B.C. complied and placed her pants, underwear, and shoes near the carport entry. Baker then pulled her into some nearby bushes and vaginally raped her. At some point, B.C. lost track of the box cutter. When he finished, Baker told B.C., "Thank You" and "I'll be seeing you again" and then left.[1] B.C. got dressed and walked quickly to the McDonald's, where the manager called the police.

Detective Steven Martin found a box cutter in a sandy area near the location of the rape. At trial, Martin denied planting the box cutter at the scene.

DNA recovered from B.C. matched Baker's profile and police arrested him on September 28, 2007. In an interview, Baker could not recall having sex with a woman in the bushes outside an apartment complex.

At trial, B.C. identified Baker as the man who raped her. Baker claimed that the sexual encounter with B.C. was consensual. He testified that he met B.C. at a concert about one month before the incident. In the following weeks, Baker met B.C. several times to help her buy marijuana from his drug dealer friend "G." Baker and B.C. smoked marijuana together and talked about "hooking up." About a week before the

[1] Report of Proceedings (RP) (Jan. 6, 2009) at 198.

incident, Baker saw B.C. in Shotze's Bar. The two talked about hooking up later that night, but had to abandon the plan when Baker's fiancé showed up.

On the morning of August 19, 2007, Baker was driving home from an all-night party when he spotted B.C. walking along 4th Avenue. Baker parked a short distance away and walked over to B.C. The two walked into the carport of an apartment building to escape the rain. After a short time, Baker began kissing B.C. and telling her she "was fine and stuff."[2] B.C. reciprocated and the two began undressing in the carport. Afraid that they might encounter someone, Baker persuaded B.C. to move a short distance away. B.C. placed her coat on the ground and then had intercourse with Baker.

While helping B.C. dress afterwards, Baker told her, "That was some cool stuff," and asked if she was "good."[3] B.C. replied, "I'm good now."[4] When Baker started to leave, B.C. asked for his telephone number, which he declined to provide because of his fiancé. Baker believed that B.C. was not pleased.

Baker denied raping B.C. or threatening her with a box cutter. He acknowledged that he did not recall the sexual encounter with B.C. during his police interview. He explained that he had not thought about the incident because the police had been asking about a rape in which the victim had been pulled into the bushes.

Comeshia Davis, Baker's fiancé, testified that she went with a friend to Shotze's Bar on August 17, 2007, and unexpectedly ran into Baker, who was talking to a young

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[2] RP (Jan. 9, 2009) at 736.

[3] Id. at 745.

[4] Id.

woman at the bar. Davis identified B.C. as the woman.

Martin Raymond Curtis, an acquaintance of Baker's, testified that he saw B.C. on two occasions with Baker during the summer of 2007. Curtis later identified B.C. on a defense photomontage and recalled seeing her at a McDonald's.

The jury found Baker guilty as charged of first degree rape with a deadly weapon. The court sentenced him to 147 months of confinement.

DISCUSSION

Baker contends that his right to a fair trial was violated when the deputy prosecutor repeatedly committed misconduct during closing argument. He must therefore demonstrate that the challenged conduct was both improper and prejudicial.[5] Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[6] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[7]

Defense counsel failed to object to three of the four alleged instances of misconduct. In such cases, the error is waived unless the argument was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.[8]

Expression of Personal Opinion and Arguing Facts Not in Evidence

Baker contends the deputy prosecutor committed misconduct when he described Ray Curtis's testimony, without objection, as follows:

> Ray Curtis struck me as an individual who as best he could tried to

[5] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

[6] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

[7] State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

[8] State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

> tell the truth. I did not get the sense when he was up there that he was lying through his hat. But I hope you were paying attention when he described how it was that he went about picking [B.C.] from this photomontage, No. 89. And there were two things that Mr. Curtis said that, quite frankly, caught my ear, and I hope they caught yours, is that when we were going through the photographs, kind of describing essentially all of the beat-up wom[e]n, that none of them looked like the person he described, he gets to photograph No. 5 here, he says I was going to pick her. Do you remember that? Why were you going to pick her? Well, she's got the bruises and the black eyes. You knew Larry was in jail for rape, so you kind of assumed this is the woman he was involved with? Yeah.
>
> And then it's the next picture that you've got with [B.C.] in her McDonald's uniform, and then Mr. Curtis goes, I see the uniform and I put it all together and this is the gal that I saw with Larry over a year ago.
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> Did you remember which McDonald's he was talking about, though? It was the one on 128th heading east where it turns into 132nd and 35th, which is north Mill Creek, south Everett. It's the wrong McDonald's, folks. He wasn't talking about the McDonald's that [B.C.] works at. It's the wrong place. It's the wrong girl.[9]

Baker argues the prosecutor expressed a personal opinion about Curtis's credibility and asserted facts not in evidence about the McDonald's Curtis described. These contentions are not persuasive.

During closing argument, the prosecutor is afforded considerable latitude to express reasonable inferences based on the evidence and to comment on the apparent credibility of witnesses.[10] Here, the challenged remarks were part of the deputy prosecutor's argument that two defense witnesses had identified B.C. from a suggestive defense photomontage. When viewed in context, the deputy prosecutor was asking the jury to draw reasonable inferences based on the circumstances

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[9] RP (Jan. 13, 2009) at 832–33.

[10] State v. Hoffman, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991).

surrounding the identification. He did not express a personal opinion on Curtis's credibility.

Baker also contends that the deputy prosecutor referred to facts not in evidence when he claimed Curtis had described a different McDonald's. B.C. testified that she worked at the McDonald's near 128th Street Southwest and 4th Avenue. A police officer testified that he responded to the McDonald's at about 8th and 128th. During cross examination, Curtis confusingly referred to both 128th and 132nd, and seemed to place the restaurant near 132nd and 119th and near the Bothell-Everett Highway. Based on the different addresses in the record, the deputy prosecutor expressed a reasonable inference that Curtis was describing a different McDonald's.

Disparaging Defense Counsel

Baker contends the deputy prosecutor improperly demeaned defense counsel during rebuttal closing argument by asserting, without objection, that defense counsel should have known better than to proffer such "BS." The deputy prosecutor may not impugn the character of the defendant's lawyer or disparage defense lawyers in general as a means to argue the defendant's guilt.[11] But the challenged remarks were a specific response to defense counsel's closing arguments and did not reach the level of reversible misconduct.

Defense counsel argued that it was "totally impossible"[12] for the box cutter to have been found in the manner that the police described, strongly implying that the police had planted the evidence. He also theorized that the police had not brought in the victim's panties because they would not have had any dirt on them, thereby

[11] See State v. Gonzales, 111 Wn. App. 276, 284, 45 P.3d 205 (2002) (deputy prosecutor impugned the integrity of defense counsel by suggesting the prosecutors, unlike defense attorneys, take an oath to "see that justice is served").

[12] RP (Jan. 13, 2009) at 854.

undermining B.C.'s account of the rape.

In response, the deputy prosecutor reminded the jury that counsels' arguments were not evidence and that it would up to the jury to decide what was or was not impossible. The deputy prosecutor also pointed out that contrary to defense counsel's assertion, the victim's panties were in evidence as part of the rape kit, and invited the jury to examine them for the presence of sand. At this point, the deputy prosecutor summarized, "So a suggestion that the police are hiding things from you or planting evidence is BS, and [defense counsel] knows better than to make those kind of arguments."[13]

Viewed in context, the comment was a specific response to defense counsel's arguments and did not malign the role of defense counsel in general or disparage defense counsel personally. Rather, the deputy prosecutor argued that the evidence did not support defense counsel's conclusions. Under the circumstances, the comment was not improper. Moreover, even if the comment could be construed to reflect negatively on defense counsel personally, any potential prejudice could have been neutralized by a curative instruction. The fact that defense counsel did not object strongly suggests that the challenged comments did not appear prejudicial in context.[14]

Appeal to Jury's Emotions

Baker contends the deputy prosecutor committed reversible misconduct during rebuttal when he invited the jurors, without objection, to put themselves in the shoes of the victim:

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[13] Id. at 876.

[14] See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

> [Defense counsel is] right in regards the fact that when I come before you and say [B.C.] may not know exactly where things happened in that breezeway because it probably was pretty traumatic for a 17-year-old kid to have this guy essentially jump out of the bushes at you and put a razor blade knife to your throat. I can't imagine as a child of that age anything more traumatic. And now the defense has the hutzpah and come in here and say she's not accurate enough about where various things happened, where she put her clothes or where she was laid down in the dirt when she was raped, well, I'll leave that up to you whether that's reasonable or not.
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> But I would suggest to you that when you go back there, you put yourself in her shoes. You put yourself in the position of being a 17-year-old girl walking to work at that time of day and somebody puts a razor blade to your throat and then a year and a half later have somebody just grill you and grill you and grill you about details, insignificant details and significant details, but just going after you, and when you get something either incorrect or inconsistent, say, ah-ha, you're lying. Think about that when you are deciding how you want to go with this case.[15]

He argues that the comments constituted an improper emotional appeal that invited the jury to decide the case based on sympathy for the victim rather than on a rational assessment of the B.C.'s credibility. We disagree.

As the deputy prosecutor noted, defense counsel strenuously argued that B.C.'s account was not credible because of inconsistencies and uncertainties in her testimony about the precise location of the crime and where she had removed her clothing. In rebuttal, the deputy prosecutor argued that the inconsistencies in B.C.'s testimony involved minor details that did not undermine her testimony about the nature of the encounter and that her credibility about the minor details should be viewed in light of her age, the time of day, and the violent circumstances of the assault. The rhetorical request to the jury to step into B.C.'s shoes was not an appeal to decide the case on

[15] RP (Jan. 13, 2009) at 881.

sympathy, but a request to assess the significance of the inconsistencies in light of the specific circumstances surrounding the charged incident. Under the circumstances, the argument was not improper.[16]

Missing Witness

Baker contends the deputy prosecutor committed misconduct by improperly invoking the missing witness doctrine and suggesting that the defense had a burden to present evidence:

> Which leads to my next question is who and where is G? You've heard about G, the one person who can actually put the two of these together. And what I mean by that, the defendant and [B.C.] in an unambiguous fashion. I sold weed to her, she bought from me and I was with these people on several occasions when marijuana was purchased and they smoked. No doubt in my mind this is someone I've sold to. Where is he?[17]

Defense counsel objected that the argument shifted the burden of proof and the trial court sustained the objection "[t]o that extent, and only that extent."[18] The deputy prosecutor responded, "Okay. The defendant has no burden of putting anything on. But wouldn't it have been interesting to hear from G?"[19]

To the extent the deputy prosecutor was suggesting that the defense had a

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[16] Baker argues that the comments also constituted an improper "golden rule" argument. Our Supreme Court has questioned whether the golden rule prohibition applies in the criminal context. State v. Borboa, 157 Wn.2d 108, 124 n.5, 135 P.3d 469 (2006) (prosecuting attorney did not commit malpractice by asking jury to imagine walking around with a disfigured face, like the victim). In any event, because the challenged argument was not an improper emotional appeal, a curative instruction could have neutralized any potential prejudice. See id. at 124.

[17] RP (Jan. 13, 2009) at 834–35.

[18] Id. at 835.

[19] Id.

burden to present evidence, the comments were improper.[20] But the court immediately sustained defense counsel's objection and reminded the jury about the burden of proof. Any impropriety was brief and isolated. The deputy prosecutor then moved on to other arguments. The jury was otherwise properly instructed about the burden of proof and the fact that counsels' comments were not evidence. Under the circumstances, there is no reasonable likelihood that the improper comment had any effect on the outcome of trial.

Baker has failed to demonstrate either individual or cumulative instances of prejudicial misconduct.

Ineffective Assistance for Failing to Request Inferior Degree Instructions

Baker contends that defense counsel provided ineffective assistance by failing to request lesser degree instructions on second and third degree rape. Defense counsel originally proposed the lesser degree instructions, and the State indicated it would not object. But after consulting with Baker, defense counsel withdrew the instructions.

Upon learning of Baker's decision, the trial court conducted an extensive colloquy on the record, during which Baker acknowledged that he understood the advantages and disadvantages of the decision to "essentially put all of your eggs in one basket, and that is the more serious charge of first degree rape."[21] Baker acknowledged that he had considered the matter for several days and said he wanted to pursue this strategy despite the advice of counsel. The trial court then found

[20] See State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

[21] RP (Jan. 13, 2009) at 813–14.

> for purposes of the record that the defendant is going against the advice of his attorney and is asking the court not to give a lesser included offense of either second or third degree rape, which are against his interests, and he's doing that on his own, and he's making a free, intelligent decision to do so.[22]

The invited error doctrine precludes a party from setting up an error at trial and then challenging that error on appeal.[23] Because Baker expressly told the trial court that he did not want the lesser degree instructions, he cannot now claim that the court's failure to instruct the jury was error. In State v. Hoffman,[24] under similar circumstances, our Supreme Court rejected any suggestion that the trial court was required to instruct the jury on lesser included offenses over the defendants' objections:

> Had the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the first degree beyond a reasonable doubt, then under the instructions given, the defendants would have been acquitted. The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic and, as we have held in analogous situations, it was not error for the trial court to not give instructions that the defendant objected to. Defendants knowingly waived any rights they had to included offense instructions, and did so after their rights were clearly and carefully explained to them by the trial court and after they had fully consulted on the matter with defense counsel.[25]

Baker argues that his counsel should have requested the lesser degree instructions despite his objection and his failure to do so constituted ineffective assistance. We disagree.

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[22] Id. at 815.

[23] State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996).

[24] 116 Wn.2d 51, 112–13, 804 P.2d 577(1991).

[25] Id. at 113.

In order to establish ineffective assistance of counsel, Baker must demonstrate both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.[26] There is a strong presumption of effective representation, and the defendant bears the burden of demonstrating there was no legitimate strategic or tactical rationale for the challenged conduct.[27]

The decision to forgo lesser included or lesser degree instructions and pursue an all-or-nothing defense may be a legitimate trial strategy.[28] Relying on State v. Ward,[29] State v. Pittman,[30] and State v. Grier,[31] Baker argues that defense counsel's failure to request the lesser degree instructions was objectively unreasonable. But Ward, Pittman, and Grier are factually distinguishable. In each case, the court's determination that an all-or-nothing strategy was objectively unreasonable rested in part on the defendants' admission of facts strongly suggesting that they were guilty of at least some offense. Such admissions increased the risk that the jury would convict the defendant of a greater offense if there were no instructions on a lesser offense.

The record establishes that Baker was well aware of the availability of the lesser

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[26] State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

[27] Id. at 336.

[28] See State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979).

[29] 125 Wn. App. 243, 104 P.3d 670 (2004).

[30] 134 Wn. App. 376, 166 P.3d 720 (2006).

[31] 150 Wn. App. 619, 208 P.3d 1221 (2009), rev. granted, 167 Wn.2d 1017 (2010).

degree instructions, the nature of the all-or-nothing strategy, the attendant risks, and defense counsel's opposition to the strategy. Baker's claim that the intercourse was consensual was a complete defense to first degree rape and the lesser degree charges. When a lesser degree instruction could weaken a defendant's claim of innocence, the failure to request such instructions is a reasonable trial strategy.[32]

In general, the defendant controls the goals of litigation and counsel determines the appropriate strategy.[33] Consequently, the "reasonableness of the defense strategy may be determined, or significantly influenced, by the defendant's statements or actions."[34] Our Supreme Court has declined to adopt a rule "that would suggest that taking nontactical considerations into account, such as a client's clearly expressed wishes, automatically renders counsel's decision constitutionally infirm."[35]

After careful consideration and with full awareness of the risks, Baker expressed his opposition to lesser degree instructions. That strategy was consistent with his claim of innocence. Defense counsel's decision not to request lesser degree instructions over Baker's objections necessarily rested on both counsel's independent strategic assessment and Baker's own informed choice. Baker has not cited any authority suggesting that defense counsel's decision under these circumstances was objectively unreasonable.[36] Baker was not denied effective assistance of counsel.

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[32] State v. Hassan, 151 Wn. App. 209, 220, 211 P.3d 441 (2009).

[33] State v. Cross, 156 Wn.2d 580, 613, 132 P.3d 80 (2006); see also RPC 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation").

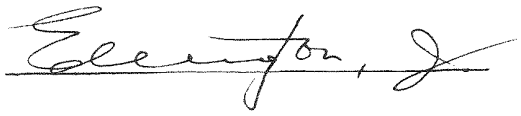
[34] Hassan, 151 Wn. App. at 220 (citing Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1974)).

[35] In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 333, 752 P.2d 1338 (1988).

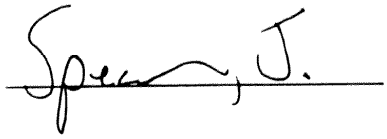
Community Custody Conditions

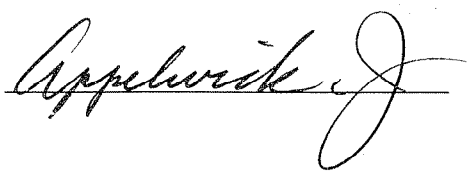
Baker next contends that the trial court erred in imposing community custody conditions prohibiting him from possessing or accessing "pornographic materials, as directed by the supervising Community Corrections Officer" and from possessing or controlling "sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist."[37] As the State concedes, our Supreme Court has ruled that both conditions are unconstitutionally vague and must be stricken.[38] We accept the State's concession and remand for resentencing without the invalid conditions.[39]

We affirm and remand only for resentencing without the invalid community custody conditions.



WE CONCUR:





[36] See, e.g., Grier, 150 Wn. App. at 630 (defense counsel withdrew requested lesser included instructions without explanation).

[37] Clerk's Papers at 25.

[38] State v. Bahl, 164 Wn.2d 739, 758–61, 193 P.3d 678 (2008).

[39] See id. at 762.